

*a***BANK UTAMA (MALAYSIA) BHD****v.****PERKAPALAN DAI ZHUN SDN BHD***b***HIGH COURT MALAYA, KUALA LUMPUR****VINCENT NG J****[SUIT NO: D1-22-1593-2001]****16 OCTOBER 2002***c*

CIVIL PROCEDURE: *Jurisdiction - High Court - Transactions and cause of action arose in Sarawak - Places of business of parties also in Sarawak - Filing of writ action in Kuala Lumpur High Court – Whether inappropriate - Whether territorial jurisdiction and forum convenience lay with High Court of Sabah and Sarawak - Courts of Judicature Act 1964 s. 23(1)*

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The plaintiff is a commercial bank having its head office in Kuching, Sarawak. In 1996, the plaintiff's Kuching branch granted a bank guarantee facility ('facility') to the defendant, a Kuching based shipping company, purportedly to avoid arrest of the defendant's vessel vide Johor Bahru High Court Admiralty Action No. 27-2-1996. Disputes arose between the parties pertaining to the facility, wherefore the defendant filed an action against the plaintiff in the High Court at Kuching. The plaintiff retorted by filing the present writ action against the defendant, claiming for indemnity and other relief. The defendant argued that it was improper of the plaintiff to have filed the writ action in the Kuala Lumpur High Court, the court not being the forum convenience, and in the circumstances, applied to set aside the plaintiff's writ and statements of claim.

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On 5 April 2002, the learned registrar allowed the application whereupon the plaintiff appealed. Before the learned judge, the primary issue that arose was whether, on the facts and in the circumstances, and bearing in mind the purport of s. 23(1) Courts of Judicature Act 1964 ('CJA'), which spelt out the factors determining the territorial jurisdiction of the High Court in civil matters, it was the High Court of Sabah and Sarawak at Kuching, and not the High Court at Kuala Lumpur, that constitutes the forum convenience for the proceedings herein.

*g***Held:***h*

[1] The territorial jurisdiction and forum convenience of the plaintiff's cause of action in the current case is the High Court of Sabah and Sarawak at Kuching. (p 454 c)

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[2] The High Court of Malaya is not the forum convenience to decide on the plaintiff's cause of action, even if s. 23(1) of the CJA confers such jurisdiction on this court. The doctrine of forum convenience calls for the matter to be heard by a court which is more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding that other courts also have territorial jurisdiction pursuant to s. 23(1) of CJA. (p 456 g) a
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[3] The High Court of Sabah and Sarawak not only has the jurisdiction, but is the forum convenience and the most appropriate court to determine this matter. This must be so as: (i) the cause of action arose in Kuching, Sarawak; (ii) the plaintiff's registered office and head office is in Kuching, Sarawak; (iii) the defendant's place of business is at all times in Kuching, Sarawak, notwithstanding that it had since moved the registered office to Kuala Lumpur; (iv) the documents in exhs. 'A1-A4' were all addressed to the plaintiff's Kuching branch and/or the defendant's place of business in Kuching, Sarawak; and (v) the material witnesses for the trial of the matter were residing in Kuching, Sarawak. Further, as the defendant had already filed an action against the plaintiff in Kuching, it is appropriate, to save costs and time, that the plaintiff address their claim, if any, as a counterclaim in that action. (pp 456 i & 457 g) c
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[Appeal dismissed.] e

Case(s) referred to:

Cita Marine Sdn Bhd v. Progressive Insurance Bhd & Ors [2001] 6 CLJ 506 (**refd**)
Dato' Ho Seng Chuan v. Rabobank Ltd [2002] 4 CLJ 475 (**refd**)
Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ 11 (**refd**) f
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 (**refd**)
Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 (**refd**)
Re Bukit Tajam Estates (Sabah) Sdn Bhd [1995] CSLR XX (4647) (**refd**)
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (**refd**)
Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (**refd**) g

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(b)
 Rules of the High Court 1980, O. 12 r. 7, O. 92 r. 4 h
For the appellant/plaintiff - Mohan Singh; M/s KM Chye & Murad
For the respondent/defendant - Vinayaga R; M/s Skrine & Co

Reported by WA Sharif i

*a***JUDGMENT****Vincent Ng J:**

b This is the plaintiff's appeal against the decision of the learned senior assistant registrar (SAR), delivered on 5 April 2002, allowing the application in encl. 6 with costs. Enclosure 6 is the defendant's application pursuant to O. 12 r. 7 and/or O. 92 r. 4 of the RHC 1980 and/or the inherent jurisdiction of the court to set aside the writ and the proceedings herein.

c The plaintiff's writ of summons and statement of claim were filed herein to claim an indemnity against the defendant, in respect of sums allegedly paid out by the plaintiff to one Chiap Seng Hong Trading Pte Ltd, Singapore (CSH). The payment was allegedly made pursuant to a Bank Guarantee/Letter of Undertaking No. 01136000016 dated 14 April 2000, issued by the plaintiff in favour of CSH. The defendant denies liability to the plaintiff in whole and/or in part.

d The background facts in brief are as follows:

e (a) In 1996, CSH commenced an Admiralty Action in Rem No. 27-2-1996 in the Johor Bahru High Court against the defendant (the JB Proceedings).

f (b) To avoid threatened arrest of its vessels, the defendant obtained a Bank Guarantee Facility, which was granted by the Kuching branch of the plaintiff, by way of a letter of offer dated 27 February 1996. Pursuant to the said Bank Guarantee Facility, a Bank Guarantee/Letter of Undertaking No. 01136960038 dated 15 April 1996, for the sum of RM4,208,869, was issued to CSH.

g (c) The Bank Guarantee/Letter of Undertaking No. 01136960038 dated 15 April 1996 expired on 14 April 1997 without any call or demand made thereunder by CSH. On 10 April 1997, it was cancelled by the plaintiff.

h (d) Subsequently, the plaintiff granted Aw and Chung (the directors of the defendant at that time) a new Bank Guarantee Facility for the same amount of RM4,208,869 in favour of CSH, by way of a letter of offer dated 6 March 1997.

i (e) Pursuant to the new Bank Guarantee Facility, Aw and Chung had signed a Contract of Indemnity dated 26 April 1997 in favour of the plaintiff.

(f) The Bank Guarantee Facility granted to Aw and Chung was later amended by the plaintiff from RM4,208,869 (as stated in the letter of offer dated 6 March 1997) to USD1,637,692.22 (its equivalent in USD) by way of a letter of offer dated 12 May 1997.

- (g) The Bank Guarantee/Letter of Undertaking in favour of CSH for the sum of USD1,637,692.22 issued under the Bank Guarantee Facility granted to Aw and Chung, and its subsequent renewals are as follows: **a**
- (i) Bank Guarantee/Letter of Undertaking No. 01136970041 dated 10 April 1997 **b**
- (j) Bank Guarantee/Letter of Undertaking No. 01136980034 dated 14 April 1997
- (k) Bank Guarantee/Letter of Undertaking No. 01136990044 dated 14 April 1999 **c**
- (l) Bank Guarantee/Letter of Undertaking No. 01136000016 dated 14 April 2000
- (h) From the plaintiff's statement of claim, it appears that CSH made a demand on the Bank Guarantee/Letter of Undertaking No. 0113600016 dated 14 April 2000, issued by the plaintiff, under the Bank Guarantee Facility granted to Aw and Chung. **d**
- (i) Pursuant to the said call, the Plaintiff had allegedly made payment to CSH the sum of USD1,267,553.35 and SGD1.965.05. **e**
- (j) It was the Defendant's contention, that although they had already been discharged and released of all liabilities to the Plaintiff with respect to the Bank Guarantee/Letter of Undertaking No: 01136960038 dated 15.4.1996, which was the only Bank Guarantee issued pursuant to the Bank Guarantee Facility granted to the Defendant, the Plaintiff had wrongfully debited the sum of RM1,238,970.30 (as at 31.8.2000) from the Defendant's current account with the Plaintiffs Kuching branch for commission due on the various Bank Guarantees/Letters of Undertaking issued pursuant to the Bank Guarantee Facility granted to Aw and Chung. **f**
- (k) Consequently, the defendant commenced legal proceedings against the plaintiff, Aw and the executor of the estate of Chung by way of Kuching Suit No. 22-101-2001 in the High Court of Sabah and Sarawak at Kuching (the Kuching action) for *inter alia*, the following: **g**
- (i) Declaration that Aw and Chung are liable to indemnify the plaintiff in respect of the Bank Guarantees issued pursuant to the Bank Guarantee Facility granted to them and that the defendant is discharged and released of all liabilities to the plaintiff; **h**

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a (ii) Order that the plaintiff refund to the defendant the sum of RM1,238,970.30 or such other sum wrongfully debited against the defendant's current account with the plaintiff, together with interests and costs.

b (l) The plaintiff then entered conditional appearance in the Kuching action, coupled with an application to set aside the defendant's writ. On 28 January 2002, the plaintiff's application to set aside the defendant's writ was dismissed with costs by the learned judge.

c After having studied the affidavits filed, and perused the written submissions of both counsel, I was of the considered view that the territorial jurisdiction and forum convenience of the plaintiff's cause of action, if any, in the current case is the High Court of Sabah and Sarawak at Kuching, and I dismissed the plaintiff's appeal. The following are my reasons:

d (1) In Malaysia, there are two High Courts of co-ordinate jurisdiction and status, that is, the High Court of Malaya and the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory and there are presently no provisions that confer power on one High Court to transfer proceedings to the other (see *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1; *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11; *Syarikat Nip Kui Cheong Timber Contractor v. Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 at p. 116; *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 at pp. 270-271; *Cita Marine Sdn Bhd v. Progressive Insurance Bhd & Ors* [2001] 6 CLJ 506; and *Re Bukit Tajam Estates (Sabah) Sdn Bhd* [1995] CSLR XX (4647).

e The factors determining the territorial jurisdiction of the High Court for civil matters are laid down in s. 23(1) of the Courts of Judicature Act 1964. This was decided by the court in the case of *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11. Sub-paragraphs (a)-(d) of s. 23(1) of the Courts of Judicature Act 1964 must be construed disjunctively and hence if any one of the limbs of s. 23(1) of the Courts of Judicature Act 1964 applies, the relevant court shall have jurisdiction, (see *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22; *Cita Marine Sdn Bhd v. Progressive Insurance Bhd & Ors* [2001] 6 CLJ 506; and also my decision in *Dato' Ho Seng Chuan v. Rabobank Ltd* [2002] 4 CLJ 475).

g Determination of encl. 6 does not pose any difficulty as it was not disputed by the plaintiff that not only were all the defendant's transactions with the plaintiff's Kuching branch, which constituted the alleged cause of action of the

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above suit, but also that the defendant's place of business was located in Kuching. It was also not seriously challenged by the plaintiff that all the facts related to this proceedings occurred in Kuching, save the Admiralty Action in Rem No. 27-2-1996 which was commenced against the defendant on 3 July 1996 in Johor Bahru High Court. On the part of the defendant, it was conceded by them that their registered office had moved to Kuala Lumpur sometime in 1999.

The pleadings disclosed that the plaintiff's cause of action was based on a payment to CSH pursuant to a Bank Guarantee/Letter of Undertaking No. 011360000-16 dated 14 April 2000, which allegedly arose directly from an (earlier) original Letter of Undertaking dated 15 April 1996 ("the LOU") issued by the plaintiff to CSH, a Singapore registered company, as a security and in consideration of CSH refraining from arresting the defendant's vessel "Gina II".

The contention of the plaintiff in resisting the application is two-fold, namely:

- (i) that s. 23(1)(b) of the Courts of Judicature Act (the Act) should be read disjunctively to confer jurisdiction to High Court Malaya in Kuala Lumpur, on the sole basis that the registered office of the defendant company had moved to Kuala Lumpur sometime in 1999; and
- (ii) that the defendant cannot be heard saying "that the High Court of Malaya has no jurisdiction to adjudicate this action commenced in furtherance of the Johor Bahru proceedings.

For ease of reference I shall set out the whole of s. 23 of the Act, which reads as follows:

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

- (a) the cause of action arose;
- (b) the defendant or one of several defendants resides or has his place of business;
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

- a* As to the plaintiff's contention (i) above, it is my considered view that it matters not a jot whether s. 23(1)(b) of the Act is read conjunctively or disjunctively as the phrase 'resides or, has his place of business' should not be taken to mean or to connote 'having a registered office'. If the latter position had been the intention of the legislature, it would have been so expressed. In my judgment, it is the place of business of a company which is of material consideration on the question of the locus of a cause of action.

- b* In support of the plaintiff's contention, the case of *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 ('*Dayasar*') was cited. Upon careful reading of the grounds of judgment, I find that *Dayasar* is of no assistance to the plaintiff's cause as, therein, the finding of the learned judge 'that the respondent company is residing in Kuching' was entirely based on its true physical location as a matter of fact, as indeed, the witnesses and all the transactions effected between the petitioner and the respondent were in Kuching. Thus, the fact that the respondent company also had its registered office in Kuching, Sarawak, was only an incidental fact in that case; though, in my view, the registered office of a company together with other factors may assist in determining its residence. It is of material importance to observe that nowhere in *Dayasar* did the learned judge hold that the registered office of the respondent company was the sole or even primary determinant of whether jurisdiction is conferred under s. 23(1)(b) of the Act.

- c* As regards (ii) above, it is beyond question that the plaintiff's case is that the cause of action originally arose from the issuance of the LOU dated 15 April 1996 but paid out *vide* Bank Guarantee/Letter of Undertaking dated 14 April 2000 to CSH by the plaintiff's branch in Kuching and not the admiralty action in Johor, though it was the admiralty action that led to the original LOU. Neither is the cause of action nor the plaintiff's suit, based on the admiralty action.

- d* Furthermore, it is also my view that the High Court of Malaya at Kuala Lumpur is not the forum convenience to decide on the plaintiff's cause of action even if s. 23(1) of the Courts of Judicature Act 1964 confers such jurisdiction on this court. The doctrine of forum convenience calls for the matter to be heard by a court which is more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding that other courts also have territorial jurisdiction pursuant to s. 23(1) of the Courts of Judicature Act 1964 (see *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22).

- e* It is clear that the High Court of Sabah and Sarawak at Kuching not only has jurisdiction but is the forum convenience and the most appropriate court to determine this matter on the following grounds:

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- (a) The cause of action arose in Kuching, Sarawak. *a*
- (b) The plaintiff's registered office and head office is in Kuching, which incidentally is also the office that granted the Bank Guarantee Facilities as well as issued the Bank Guarantees/Letters of Undertaking.
- (c) The defendant's place of business is at all material times, and still is, in Kuching, Sarawak, notwithstanding the fact that its registered office had moved to Kuala Lumpur in 1999. *b*
- (d) All the relevant documents exhibited as exhs. "A1"- "A4" of encl. 7, are addressed to the plaintiff's Kuching branch and/or the defendant's place of business in Kuching, Sarawak. *c*
- (e) The material witnesses for the trial of this matter must surely reside in Kuching, Sarawak as all transactions between the parties took place in Kuching, Sarawak. *d*

Furthermore, in my view as the defendant has filed action against the plaintiff in Kuching, it is more appropriate, to save costs and time, for the plaintiff to address their claim, if any, as a counterclaim in the defendant's Kuching action for the following reasons:

- (a) The parties to the action are the same, with the exception that in the Kuching action, aside from the plaintiff, the defendants include Aw and the estate of Chung. *e*
- (b) The Kuching action had been commenced by the defendant against the plaintiff prior to the commencement of the current action by the plaintiff. *f*
- (c) The issues raised and the subject matter of the Kuching action and the proceedings herein are the same, that is, the right of the plaintiff to be indemnified pursuant to a call made by CSH on the Bank Guarantee/Letter of Undertaking No. 01136000016 dated 14 April 2000, issued pursuant to the Bank Guarantee Facility granted by the plaintiff to Aw and Chung. *g*
- (d) The issues and matters raised herein are matters that could have been properly raised as a counterclaim in the Kuching action.

I am entirely satisfied that the SAR was correct in allowing the defendant's application to strike out the claim. In the event, I dismissed the plaintiff's appeal (*vide* Notice of Appeal dated 9 April 2002) with costs. *h*

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